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RECEIVED

April 7, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Hand Delivered

William E. Kennard, Chairman
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 832
Washington, D.C. 20554

Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 802
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Michael K. Powell, Commissioner
Federal Communications Commission
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Federal Communications Commission
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Common Carrier Bureau
Federal Communications Commission
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Geraldine Matisse, Chief
Network Services Div., Common Carrier Bur.
Federal Communications Commission
2000 M Street, N.W. - Room 235
Washington, D.C. 20554

In re: CC Docket No. 95-155
Toll Free Numbers (877 Implementation)

Ladies and Gentlemen:

The *Fourth Report and Order* (FCC 98-48), released on March 31, 1998, falsely promised that 877 numbers would be assigned on a first-come, first-served basis and that "[a]ll subscribers would be given an equal opportunity to reserve toll free numbers as new codes are opened." (paragraph 25) The new 877 toll free code opened on Sunday, April 5, 1998, but nothing even remotely resembling a first-come, first-served mechanism is in place. It is imperative that you act now to deal with this serious problem before 877 numbers are assigned and activated.

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William E. Kennard

April 7, 1998

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Please understand that this is *NOT* about the Commission's refusal to stay 877 implementation or to adopt ResponseTrak's proposal. Rather, this is about the fact that the Commission, in the *Fourth Report and Order*, adopted a first-come, first-served mechanism which (a) most RespOrgs have no intention of truly honoring, and (b) the current system can not accommodate even if the RespOrgs wanted to honor it.

Accompanying this letter, for your information, is an *Informal Complaint & Request for Expedited Consideration* filed yesterday on behalf of ResponseTrak[®] Call Centers. It outlines the specific failures of both AT&T and MCI to honor the Commission's first-come, first-served requirement with respect to ResponseTrak. But the problems are systemic--they flow not merely from the failure of specific RespOrgs, but rather the lack of any system whatsoever to give effect to the first-come, first-served objective. Even if every RespOrg acted in the utmost good faith, the system established by the Commission and SNAC is not capable of providing subscribers with first-come, first-served access to toll free numbers.

I urge you to read the attached informal complaint, not so much as to the merits of the specific two cases involved, but rather as a demonstration of the failure of the system in place to deliver the first-come, first-served access promised by the Commission. This is an urgent matter. The first 877 numbers were assigned on Sunday, April 5, 1998. **YOU MUST ACT NOW TO FREEZE ACTIVATION OF THOSE NUMBERS AND ANY FURTHER ASSIGNMENT OF 877 NUMBERS UNTIL THIS MATTER IS RESOLVED.** Because of the time-sensitive nature of this problem, ResonseTrak has directed me to seek a judicial stay of the *Fourth Report and Order*. Hopefully, this can be avoided.

In accordance with 47 C.F.R. § 1.1206(b)(1), two copies of this letter are being submitted to the Office of the Secretary for inclusion in the public filed for CC Docket No. 95-155.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,

A handwritten signature in black ink, reading "Robert J. Keller". The signature is written in a cursive, flowing style with a long horizontal flourish at the end.

Robert J. Keller

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April 6, 1998

Robert W. Spangler, Acting Chief
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

In re: **Informal Complaint & Request for Expedited Consideration**
ResponseTrak vs. AT&T and MCI

Dear Mr. Spangler:

ResponseTrak[®] Call Centers, a division of New England 800 Company ("ResponseTrak"), by its attorney and pursuant to Section 208 of the Communications Act of 1934, as amended, 47 U.S.C. § 208, and Section 1.716 of the Commission's Rules and Regulations, 47 C.F.R. § 1.716, hereby submits this informal complaint against AT&T Corp. ("AT&T") and MCI Telecommunications Corporation ("MCI"). AT&T and MCI will from time to time be jointly referred to herein as the "Carriers."

Request for Expedited Consideration

The 877 toll free code was scheduled to open yesterday, on Sunday, April 5, 1998, and presumably did so. The Commission assured ResponseTrak and all public subscribers that 877 numbers would be assigned on a first-come, first-served basis, and that "[a]ll subscribers would be given an equal opportunity to reserve desirable toll free numbers as new codes are opened." *Fourth Report and Order* (FCC 98-48) in CC Docket No. 95-155, ___ FCC Rcd ___ at ¶ 25. (released March 31, 1998), 63 Fed. Reg. 16440 (April 3, 1998). Nevertheless, as demonstrated herein, with respect to specific 877 numbers requested by ResponseTrak, the Carriers did not follow the Commission's first-come, first-served mandate. **IT IS THEREFORE IMPERATIVE THAT THE COMMISSION ACT IMMEDIATELY TO REMEDY THIS PROBLEM BEFORE THE NUMBERS IN QUESTION ARE ACTIVATED.** This is a systemic problem that requires a universal remedy--at least if the Commission's promise of first-come, first-served was indeed sincere. At a minimum, however, the Commission should order an immediate freeze on the assignment and activation of the specific numbers at issue pending consideration of this informal complaint.¹

Preliminary Information

The name, address, telephone number, etc., for the complainant are:

ResponseTrak Call Centers
Attn: Steve White, President
251 Jefferson Street
Waldoboro, Maine 04572-6011

Telephone: 207-832-0800
Facsimile: 207-832-0803
Email: steve@ne800.com

¹ The four numbers in the 877 code are: 225-5669, 225-5609, 872-6346, and 437-7371.

Correspondence or questions concerning this matter may be directed to special communications counsel for the complainant at:

Robert J. Keller
Robert J. Keller, P.C.
4200 Wisconsin Ave., N.W.
Suite 106 - Box 233
Washington, D.C. 20016-2157

Telephone: 888-320-5355
Facsimile: 888-229-6875
Email: rjk@telcomlaw.com

To the best information and belief of ResponseTrak, the names and addresses of the carriers against whom this complaint is being made are:

AT&T Corp.
32 Avenue of the Americas
New York, NY 10013-2412

MCI Telecommunications Corporation
1801 Pennsylvania Ave., NW
Washington, DC 20006

Introduction

ResponseTrak is a division of New England 800 Company, a corporation headquartered in Waldoboro, Maine. The Company is a Maine-based developer and provider of custom call center services and systems. With a staff of over 125 persons, the company provides inbound call center services to more than 30 clients, 24 hours a day, seven days a week. The company's call centers receive and process over 500,000 transactions annually, and are growing at a rate which will soon double that volume.

In its capacity as a call center, ResponseTrak manages approximately 200 toll free telephone numbers for itself and its customers. These numbers are used in various applications, e.g., direct response marketing, emergency after-hours dispatch, consumer advocacy, customer service, merchandise fulfillment and return services, etc. In most of these applications, public recognition of the number is extremely important, and in many cases public confusion regarding the number is potentially devastating to the businesses involved. Because of this, ResponseTrak arranged to have the 888 replicas of 21 of the 800 toll free numbers that it manages placed in the 888 set-aside established in the *Report and Order* (DA 96-69) in CC Docket No. 95-155, 11 FCC Rcd 2496 (Com. Car. Bur. 1996). ResponseTrak has also been attempting, starting as early as November of 1997, to arrange for the reservation of the replicas of these numbers in the newly opened 877 service access code.² This complaint relates to the failure of the Carriers to adequately respond to ResponseTrak's reasonable requests in this regard and their failure to comply with applicable statutory provisions, regulations, and FCC policies.

² Although ResponseTrak believes the anti-hoarding regulations adopted in the *Second Report and Order* (FCC 97-123) in CC Docket No. 95-155, 12 FCC Rcd 11162 (1997), should be modified, we hasten to note that ResponseTrak and its customers will fully comply with those regulations unless and until they are changed. The nature of ResponseTrak's business and the businesses of its customers is such that active use will be made of the numbers being reserved. By obtaining and controlling the numbers, however, ResponseTrak can assure that the replicas are not used in ways that would interfere with the corresponding 800 versions.

Facts Relating to AT&T

ResponseTrak obtains the bulk of its long distance telecommunications service through Avis Rent A Car, Inc., or one of its affiliates or subsidiaries ("AVIS"), which resells service under AT&T's Tariff F.C.C. No. 12 for Virtual Telecommunications Network Service.³ Although it does not obtain VTNS directly from AT&T, ResponseTrak (or New England 800 Company) is recognized as the AT&T subscriber of record for purposes of making service changes, e.g., re-routing of traffic in the event of an emergency outage. AT&T is currently the RespOrg for ResponseTrak's 800 numbers that correspond to the 877 numbers at issue in this complaint.

On or about November 21, 1997, ResponseTrak contacted AVIS and asked that the 877 replicas of the 21 numbers ResponseTrak has in the 888 set-aside be pre-reserved or pre-registered with AT&T. AVIS contacted AT&T but was unable to obtain any information on a procedure for pre-registration of 877 numbers. Over the next two months, ResponseTrak continued to press AVIS for pre-reservation of the 877 numbers. On January 23, 1998, AVIS submitted a request to AT&T, in writing, expressly asking that 21 specific 877 numbers be reserved on behalf of ResponseTrak (New England 800 Company). See Attachment No. 1. AVIS made repeated follow-up inquiries, including a further inquiry in writing on February 4, 1998. See Attachment No. 2. ResponseTrak, through AVIS, continued to make follow-up inquiries and requests of AT&T regarding the pre-reservation of the 21 numbers.

Despite ResponseTrak's diligence and persistence, it was not until Friday, April 3, 1998--only 48 hours prior to the scheduled rollout of 877--that ResponseTrak was able to get any information from AT&T regarding the status of its long standing and repeated requests for reservation of the 21 numbers. Only after intervention on ResponseTrak's behalf by FCC and Congressional staff did AT&T finally advise ResponseTrak that 17 of the 21 numbers requested had been successfully pre-reserved. Four of the numbers were not available to ResponseTrak, allegedly having been reserved by one or more other AT&T subscribers. According to AVIS, the request for ResponseTrak's numbers had not been entered into the AT&T database until Thursday, April 2, 1998--more than four months after ResponseTrak's first inquiry, and more than 60 days after its first written request. On Friday, April 3, 1998, as the result of intervention by FCC and Congressional staff, ResponseTrak was ultimately directed to AT&T's brand manager for toll free services. He advised ResponseTrak asserted that: (a) AT&T's pre-reservation processes and procedures had been "very well publicized internally," (b) "notification was provided through every channel," and (c) AT&T "can not be responsible for" every account representative and has "no way to ensure that every account team reads the information they receive" and that AT&T. He further stated that AT&T makes no attempt to determine when requests for 877 numbers were first submitted by the subscribers, and instead relied solely on the date/time stamp entered into the pre-reservation database.

Facts Relating to MCI

ResponseTrak is also an MCI customer for some of its long distance service. On or about November 21, 1997, ResponseTrak learned that MCI would be accepting pre-reservations for 877 numbers on a first-come, first-served basis. ResponseTrak was advised that MCI staff would first have access to the pre-reservation database starting at 11:00 A.M EST on December 1, 1997. ResponseTrak immediately inquired of its MCI account team what procedure was necessary to be "first out of the gate" on 877 reservations. ResponseTrak was told that a Ms. Tricia Austin was handling such requests and was directed to her. ResponseTrak telephoned Ms. Austin and discussed the nature and importance of its request.

³ ResponseTrak does not know whether this particular service has been de-tariffed, *see Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order (FCC 95-427), 11 FCC Rcd 3271 (1996), Order on Reconsideration (FCC 97-366), 9 Com. Reg. (P&F) 1187 (1997), but it is, in any event, subject to the antidiscrimination provisions of Title II and the toll free number regulations and policies adopted in CC Docket No. 95-155.

On Tuesday, November 25, 1997, ResponseTrak transmitted its request for pre-reservation of the 21 numbers to Ms. Austin, in writing, by facsimile. The fax cover sheet was flagged "URGENT," and specifically requested a call-back confirming receipt. ResponseTrak received no call back from Ms. Austin or anyone else from MCI to confirm receipt of the fax that day. On Wednesday, November 26, 1997, ResponseTrak contacted Ms. Austin who stated that she had not received the fax. The fax was re-transmitted that day at approximately 9:35 AM. Later that day Ms. Austin confirmed receipt of the fax. The importance of this matter was again communicated to Ms. Austin who assured ResponseTrak that she would be at her terminal to enter the request at 11:00 AM on Monday morning.

Monday, December 1, 1997 came and went with no communication from Ms. Austin or anyone else at MCI regarding ResponseTrak's request. ResponseTrak attempted to contact Mr. Austin, but could only reach her voice mail. On the morning of Tuesday, December 2, 1997, ResponseTrak finally reached Ms. Austin who was then still in the process of trying to reserve the numbers. It was not until later that afternoon that Ms. Austin advised ResponseTrak that she was unable to pre-reserve one of the numbers⁴ because it allegedly had already been reserved by another MCI customer. When asked why she had not processed ResponseTrak's request the day before as had been promised, she stated that she had been sent to a training class in Boston on Monday and therefore was unable to submit ResponseTrak's request until Tuesday. Neither Ms. Austin nor her immediate supervisor took any steps to cover for Ms. Austin while she was in class. When confronted on this score, Ms. Austin's supervisor stated that it was "not her job" to cover for Ms. Austin.

Based on information provided by MCI, the number in question was allegedly reserved for a company called CompuCard, which ResponseTrak believes to be an operating division of Cendant, a global multi-billion dollar conglomerate. ResponseTrak respectfully submits that it is no coincidence that a company with the size and financial strength of Cendant had its request for the number timely processed while the request of ResponseTrak, a substantially smaller company and, hence, comparatively less important account to MCI, was bumbled. Moreover, ResponseTrak is confident that when the Commission investigates this complaint it will find that the numbers which AT&T failed to pre-reserve for ResponseTrak were likewise reserved for major AT&T accounts.

The Carriers Violated the Law

FCC Rule Section 52.111. The Carriers failed to discharge the Commission's first-come, first-served mandate. This is in direct violation of the newly adopted regulation, Section 52.111 of the Commission's Rules: "Toll free numbers shall be made available on a first-come, first-served basis unless otherwise directed by the Commission." 63 Fed. Reg. at 16441, *to be codified as* 47 C.F.R. § 52.111. Even prior to the adoption of Section 52.111, in early 1996, the Commission had already mandated that toll free numbers be allocated in a non-discriminatory fashion and on a first-come, first served basis. *Report and Order*, 11 FCC Rcd at 2504. Thus, the Carriers had more than two years to devise adequate first-come, first-served procedures, but neglected to do so.

Communications Act Section 202(a). The actions of the Carriers are unreasonably discriminatory in violation of Section 202(a) of the Communications Act, which provides, *inter alia*, that "[I]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination ... in connection with like communication service ... or to make or give any undue or unreasonable preference or advantage to any particular ... class of persons, ... or to subject any particular ... class of persons ... to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).⁵ The Carriers, by failing to implement an adequate first-come, first-served

⁴ The number that was lost was 877-225-5669.

⁵ The provisioning of toll free numbers from the SMS database is a common carrier service subject to Title II of the Communications Act. *Provision of Access for 800 Service, Order* (FCC 93-84) in CC Docket No. 86-10, 8 FCC Rcd 1423 at ¶¶ 25-31 (1993); *Beehive Telephone, Inc. v. The Bell Operating Companies*, 10 FCC Rcd 10562 at ¶¶ 15-22 (1995). The antidiscrimination provisions of Title II apply to the allocation and provisioning of telephone numbers. *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, 10 FCC Rcd 4596 (1995).

mechanism have indisputably subjected ResponseTrak to undue or unreasonable prejudice. Moreover, on information and belief, 877 numbers requested by the Carriers on their own behalf and for their major accounts were queued ahead of the requests of ResponseTrak and other small businesses, giving the Carriers and their large accounts undue and unreasonable preference and advantage.

Request for Relief

ResponseTrak has been injured by the actions of AT&T and MCI in that its right to have its 877 numbers reserved on a first-come, first-served basis⁶ and its right to have its requests honored on a nondiscriminatory basis⁷ have been violated. As noted earlier, however, the problems experienced here are systemic and a global remedy is required. The Commission has mandated a first-come, first-served policy to assure that toll free numbers are allocated to subscribers on a fair and equitable basis, but it has established no procedures to accomplish this noble result. Moreover, the RespOrgs to whom the Commission has abdicated the sole responsibility for implementing the policy have absolutely no accountability to the Commission, to the subscribers, or to anyone else in this regard.

The problem, and the resulting illegalities, go beyond the wrongdoing of the carriers as outlined above. If the Commission is to deliver on its promise that toll free numbers will be made available to subscribers on a first-come, first-served basis, it must address three significant shortcomings of the system, namely, inadequacies in notice, process, and accountability.

- Notice. The Commission must promulgate specific requirements for RespOrgs to notify their customers and potential customers regarding the availability of the procedure for reserving specific toll free numbers. The facts of the foregoing complaint demonstrate the seriousness of this problem. Despite diligent efforts, ResponseTrak was never able to obtain accurate guidance from AT&T regarding the appropriate procedure to follow in reserving 877 numbers. If this was true of ResponseTrak, who is well informed of and has been actively involved in toll free numbering matters, and who acted promptly, proactively, and persistently, the average small business subscriber has absolutely no hope of ever getting timely notice. First-come, first-served requires that RespOrgs assume an affirmative obligation to educate their subscribers and to give them adequate notice.
- Process. Adequate and timely notice does not, in itself, guarantee a customer first-come, first-served treatment. ResponseTrak had advance notice from MCI of what was required to reserve 877 numbers, but there was still a failure in the process. Moreover, even if MCI had properly discharged its commitment, ResponseTrak still would not have been guaranteed first-come, first-served treatment. The best that a customer can hope for, even under ideal circumstances, is to be first with its particular RespOrg. But under the system as implemented by SNAC, DSMI is blind to the priority in time of individual users when it receives number requests from RespOrgs. DSMI may treat requests from RespOrgs on a first-come, first-served basis, but that does not by any means translate into "*subscribers ... be[ing] given an equal opportunity to reserve desirable toll free numbers.*" *Fourth Report and Order* (FCC 98-48) at ¶ 25 (emphasis added). Let us take ResponseTrak's situation as an example. ResponseTrak submitted a written request for 21 toll free numbers to AT&T on January 23, 1998. Even assuming AT&T had honored that request and moved ResponseTrak's request to the top of AT&T's reservation list for that particular number, ResponseTrak could still very easily lose the number to a subscriber to a different RespOrg who did not place its request until much later than ResponseTrak. There are at least two reasons why this could occur: (1) because the other customer's RespOrg submits its request to DSMI prior to AT&T, and/or (2) because the other customer's request is near the top of its RespOrg's batch request while ResponseTrak's is near the bottom of AT&T's batch request. This is a failure on the part of AT&T and MCI as well as all the other RespOrgs and SNAC.

⁶ *Report and Order*, 11 FCC Rcd at 2504; *Fourth Report and Order* (FCC 98-48) at ¶ 25; 47 C.F.R. § 52.111.

⁷ 47 U.S.C. § 202(a).

The industry has known for more than two years that the Commission's policy was first-come, first served (indeed, the RespOrg/carrier community was advocating that as the policy as opposed to other solutions being proposed for vanity numbers), yet no effort was made to develop an integrated, unified process to assure that *subscribers* (not just RespOrgs) have their number requests processed on a first-come, first-served basis.

- Accountability. Finally, the promise of first-come, first-served can not be realized, and fashioning remedies for failures is problematic, because there is no audit trail or any other form of accountability of the RespOrgs to the Commission or the subscribers for their actions in connection with number reservations. In the absence of specific and enforceable record-keeping requirements, there is no way to know when a customer's request was placed with a RespOrg vis-à-vis those of other customers. It should come as no surprise to the Commission, therefore, that in almost virtually every dispute that arises over the claim to a particular toll free number, the entity that is actually assigned the number is almost always a major account with substantial financial resources, and the subscriber who lost the number is a small business. A small business subscribers is asked to take the RespOrg's word for it that its number request was not the first in time, even though the RespOrg has substantial financial incentive to favor the larger account. In this case, for example, ResponseTrak has no way of verifying the claims of AT&T and MCI that other subscribers requested some of the same numbers first. A theoretical right of first-come, first-served, but without any practical accountability or auditability, is not a right at all--it is just a collection of meaningless words.⁸

In view of the foregoing, ResponseTrak respectfully asks the Commission to immediately freeze the assignment and activation of all 877 numbers pending consideration of this complaint. The Commission should immediately conduct a full inquiry into the procedures used by RespOrgs to pre-reserve, register, and request toll free numbers on behalf of subscribers. Based on the results of such investigation, the Commission should issue general guidelines to the RespOrgs on how to accomplish a truly first-come, first-served mechanism, and direct the industry to develop formal procedures to implement those policies. Upon a review of those procedures and a determination by the Commission that they provide for true first-come, first-served effect at the subscriber level, the Commission should require that all 877 numbers be returned to the SMS pool of available numbers and the reservation, request, and assignment process should be repeated based on the newly adopted procedures.

If the Commission is for any reason unable or unwilling to adopt the universal, systemic relief described above, it must, at a minimum, fashion a remedy adequate to place ResponseTrak in the posture it would have been had its first-come, first-served regulatory rights and its statutory rights against discrimination been honored by AT&T and MCI.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,



Robert J. Keller
Counsel for ResponseTrak Call Centers

⁸ This does not even begin to address the problem of numbers reserved by a RespOrg on its own account. Even if there is adequate and timely notice, an otherwise equitable procedure, and meticulous audit trail requirements, a how is any subscriber expected to be able to submit a request for a number prior to the RespOrg forming its own intention to seek that number? And how would that ever be demonstrated even if it occurred?

AVIS

COMPANY: AT&T

To: Diane Coligan fax-908 805 6084

FROM: Jeff Gordon

DATE: January 23, 1998

SUBJECT: 877 Reservations

COMMENTS:

Please reserve the following 877 numbers for our customer "New England 800 Company": (He is very anxious to reserve these numbers).

877 225 5669	877 426 3282	877 872 6246
877 225 5609	877 225 3800	877 437 7371
877 225 5800	877 245 6325	877 724 6437
877 258 4100	877 537 4297	877 258 3262
877 927 8366	877 547 2247	877 988 7282
877 342 5609	877 765 2247	877 243 7692
877 843 7686	877 624 6380	877 654 3679

Please call me to confirm receipt at 516 932 7325.

Thank you.

AVIS
TELECOMMUNICATIONS

Voice : 516-932-7500

Fax : 516-932-7515

COMPANY : AT&T
ATTN. : Diane Colligan
CC :

FAX : 732-805-6084

FROM : Jeff Gordon
DATE : 2/4/98VOICE: (516) 932 - 7500
PAGES: 4 (Including Cover)

SUBJECT : Open Issues

Bdy (5798)

COMMENTS:

Below is a summary of outstanding issues requiring a response/resolution:

1. [REDACTED]

2. [REDACTED]

3. Reservation of 877 numbers: What process/policy if any is in place to pre-reserve these numbers? Our customer, New England 800, is anxious to reserve 21 numbers (as detailed in my memo dated 1/23/98).

Please call 516-932-7500 to confirm receipt and to discuss these items.

Thank You.